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No. 90-585

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In The

Supreme Court of the United States

October Term, 1990

DONALD E. WILLIAMS, COMMISSIONER OF THE DEPARTMENT OF MOTOR VEHICLES, COMMONWEALTH OF VIRGINIA, and VIRGINIA AUTOMOBILE DEALERS ASSOCIATION, INC.,

Petitioners,

v.

SATURN DISTRIBUTION CORPORATION,

Respondent.

REPLY BRIEF FOR PETITIONERS

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Donald E. Williams, Commissioner of the Department of Motor Vehicles of the Commonwealth of Virginia, and the Virginia Automobile Dealers Association, Inc. file this reply brief, pursuant to Rule 15.6 of the Rules of the Supreme Court of the United States, to address an argument first raised in Respondent's brief in opposition.

Respondent, Saturn Distribution Corporation ("Saturn"), previously has argued that the Federal Arbitration Act ("FAA" or the "Act") applies to laws of contract formation in addition to those which relate to the enforcement of arbitration agreements. In its brief in opposition, Saturn now returns to the language of the Act and argues

that the "FAA plainly prohibits a state from refusing to recognize the 'validity' of an arbitration provision on grounds that do not apply to contract terms generally." *Id.* at 13. This argument begs the question as to whether the FAA applies to laws of contract formation at all. Saturn does not explain how it jumps from the language of the FAA – that an *agreement* to arbitrate shall be "valid, irrevocable and enforceable" – to the proposition that the Act "plainly" prohibits Virginia from regulating the formation of an arbitration *provision* because the statute in question does not apply to all contract terms generally.

Saturn's argument is yet another indication of the basic flaw underlying its position. As discussed in Section I of Petitioners' petition for writ of certiorari, the language and the legislative history of the Act confine its scope to the *enforcement* of existing arbitration *agreements*. Pet. at 9-14. The FAA was designed "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985). In this context, the "savings clause" of the FAA – that an arbitration agreement is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract" – is consistent with the congressional purpose in passing the legislation, which "was to make arbitration agreements as *enforceable* as other contracts, *but not more so.*" *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (emphasis added).

Saturn, however, ignoring the language and especially the legislative history of the FAA, redrafts the Act to make it apply to state laws of contract formation. Once

that has been accomplished, Saturn reapplies the "savings clause," resulting in the sweeping preemption of *any* state statute which imposes a burden on arbitration provisions "that do not apply to contract terms generally." Br. in Opp. 13. Therefore, under Saturn's theory – and under the panel majority's decision – any state law applying to the formation of specific agreements by regulating the use of certain types of contract provisions which are otherwise valid, but which necessarily encompass arbitration, would be preempted by the FAA because such law does not apply to *all* contract terms generally. Thus, a state statute regulating the formation of forum selection provisions in a limited category of contracts would be preempted by the FAA if such statute does not segregate arbitration and specifically exempt that type of alternative dispute resolution from its scope. This is precisely the result of the panel majority's decision. This interpretation of the FAA does more than place arbitration agreements on equal footing with other contracts. It elevates arbitration provisions to the status of an untouchable. This recasting of the FAA would cripple the states in the exercise of their traditional police powers.

The issue of whether the FAA may be expanded to apply to the laws of contract formation is *not* one which this Court has decided. Moreover, the lower courts to which this issue has been presented have not been as unanimous as Saturn would have this Court believe. Br. in Opp. 11. The lack of unanimity is evident from the district court's opinion and particularly Judge Widener's dissent, which are not mentioned in Saturn's brief in opposition. "That four federal judges expressed three different opinions on the same issue [in *Saturn*] bespeaks

the issue's difficulty and the need for the Supreme Court to resolve it." Note, *Saturn Distribution Corporation v. Williams*, 26 Tort & Ins. L.J. 149, 156 (1990).

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the writ should be granted.

Respectfully submitted,

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